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No. 00-514

# In the Supreme Court of the United States

J.V. PETERS & COMPANY AND DAVID B. SHILLMAN, PETITIONERS

*v.*

UNITED STATES OF AMERICA, ET AL.

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT*

## BRIEF FOR THE RESPONDENTS IN OPPOSITION

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## QUESTIONS PRESENTED

1. Whether the Environmental Protection Agency's action was time-barred when EPA's motion to amend was filed within the limitations period.

2. Whether an administrative law judge's decision to allow witnesses in a 1994 hearing to adopt testimony from a prior hearing in the same action, when opposing counsel had the opportunity to cross-examine the witnesses at both hearings, comported with the requirements of due process.

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### OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A19) is unpublished, but the decision is noted at 221 F.3d 1336 (Table). The opinion of the district court (Pet. App. A20-A41) is unreported.

Earlier decisions, both administrative and judicial, may be found in the Supplemental Appendix (Supp. App.) to the petition for a writ of certiorari. They are the following decisions:

*In re J.V. Peters & Co.*, Environmental Appeals Board Appeal No. 95-2, 1997 WL 221388 (Apr. 14, 1997)

*In re J.V. Peters & Co.*, Initial Decision on Court Remand in Docket No. V-W-81-R-75, 1995 WL 442019 (EPA July 18, 1995)

*J.V. Peters & Co.* v. *Reilly*, Case No. 1:90 CV 2246, slip op. and order (N.D. Ohio 1991)

*J.V. Peters & Co.* v. *Reilly*, 923 F.2d 854 (6th Cir. 1990) (Table)

*In re J.V. Peters & Co.*, Final Decision of EPA's Chief Judicial Officer in Docket No. V-W-81-R-75, 1990 WL 303851 (Aug. 7, 1990)

*In re J.V. Peters & Co.*, Initial Decision of the Administrative Law Judge After Remand from EPA's Chief Judicial Officer in Docket No. V-W-81-R-75, 1988 WL 236321 (Sept. 26, 1988)

*In re J.V. Peters & Co., Inc.*, EPA's Chief Judicial Officer's Decision on EPA's Motion for Reconsideration in Docket No. V-W-81-R-75, 1986 WL 69034 (Oct. 23, 1986)

*In re J.V. Peters & Co., Inc.*, Remand Order issued by EPA's Chief Judicial Officer in Docket No. V-W-81-R-75, 1986 WL 69028 (May 9, 1986)

*In re J.V. Peters & Co., Inc.*, Initial Decision of the Administrative Law Judge in Docket No. V-W-81-R-75, 1985 WL 57141 (EPA May 15, 1985)

**JURISDICTION**

The judgment of the court of appeals was entered on June 29, 2000. The petition for a writ of certiorari was filed on September 27, 2000. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## STATEMENT

1. This case involves a now-defunct hazardous waste storage and reclamation facility in Middlefield Township, Ohio. Petitioners are David Shillman, the former manager of the facility, and J.V. Peters & Co. (the Partnership), the partnership that began operating the facility in June 1980. The two partners were Shillman's wife, Dorothy Brueggemeyer, and John Vasi.

In December, 1980, an Ohio Environmental Protection Agency inspector reported to the federal Environmental Protection Agency (EPA) multiple violations at the facility of hazardous waste storage and handling requirements of the Resource Conservation and Recovery Act of 1976 (RCRA), 42 U.S.C. 6901 *et seq.*[1] Pet App. A2-A3. A copy of the inspection report was sent to the Partnership. *Id.* at A3. Two weeks later, the partners dissolved the Partnership and transferred its assets and liabilities to a newly formed corporation, J.V. Peters and Company, Inc. (the Corporation). Shillman became the president and chairman of the board of directors for the Corporation and Brueggemeyer be-

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[1] These violations are detailed at Supp. App. A234-A237, and include failing to obtain a physical analysis of representative samples of waste prior to treatment and storage; failing to take adequate and required safety precautions; operating the hazardous waste facility without a permit; not fencing the facility; failing to keep adequate records; failing to maintain containers of hazardous waste in a closed condition; and failing to make appropriate filings and arrangements with appropriate emergency response officials.

It later became necessary for EPA to undertake a CERCLA removal action at the site because of the release or threatened release of hazardous substances presenting an imminent and substantial danger to the public health or welfare. See *J.V. Peters & Co., Inc.* v. *Ruckelshaus*, 584 F. Supp. 1005, 1007-1008 (N.D. Ohio 1984), aff'd, 767 F.2d 263 (6th Cir. 1985).

came the secretary, the treasurer, and a member of the board. The business of the Corporation was identical to that of the Partnership. *Ibid.*

2. Based on the inspection report from the Ohio agency, EPA filed an administrative complaint against the Corporation, assessing a $25,000 civil penalty. Pet. App. A3. In 1984, EPA filed an amended complaint, which again named only the Corporation as defendant. *Id.* at A3-A4. At a three-day evidentiary hearing before an EPA administrative law judge (ALJ) in October 1984, petitioners' attorney vigorously and thoroughly cross-examined EPA's two witnesses. Shillman testified as a witness for the Corporation, admitting that the facility was in violation of RCRA when the inspection was conducted. His testimony also established that, at the time of the inspection, the facility was owned by the Partnership and that the Corporation had not yet been formed. Shillman described the transfer of all Partnership assets and liabilities to the Corporation, which was created on January 30, 1981, and affirmed that the business of the Corporation was the same as the business of the Partnership. Supp. App. A51-A52.

In April 1985, EPA filed a motion to amend its complaint in order to add the Partnership and Shillman as respondents. Pet. App. A24. The motion did not seek to add Brueggemeyer. *Ibid.* The ALJ did not expressly rule on this motion, but instead, on May 15, 1985, issued a decision (Supp. App. A201-A248) holding the Partnership, the Corporation, and Shillman liable for the violations at the facility and assessing a civil penalty of $25,000. Pet. App. A24.

3. The Corporation, Partnership and Shillman appealed the ALJ's decision to EPA's Chief Judicial Officer (CJO). On May 9, 1986, the CJO (Supp. App. A186-A200) held that the ALJ erred by imposing lia-

bility on the Partnership and Shillman when they were not named in the complaint and remanded the matter to allow EPA to amend its complaint and to give Shillman and the Partnership an opportunity to present their defense. Pet. App. A5.

4. On remand, EPA filed a second amended complaint in November 1987, naming as respondents the Corporation, the Partnership, Shillman, Brueggemeyer, and Vasi. Pet. App. A5. Those respondents, except Vasi,[2] answered, denying the violations and asserting that the claim was barred by 28 U.S.C. 2462, which they read as requiring that an action to enforce a civil penalty be commenced within five years after the claim arises. Pet. App. A25. EPA moved for an accelerated decision, the "administrative equivalent of summary judgment," *id.* at A6, based on the testimony and evidence from the 1984 hearing and upon the admissions in the answer to the original complaint. *Ibid.* On September 26, 1988, the ALJ granted this motion (Supp. App. A167-A180) and found Shillman, Brueggemeyer, Vasi, and the Partnership liable for the violations and for a penalty of $25,000. Pet. App. A25-A26. The ALJ rejected the statute of limitations defense. *Id.* at A26. On appeal, the EPA's CJO affirmed (Supp. App. A141-A166). Pet. App. A6.

5. Shillman, Brueggemyer and the Partnership appealed the decision to federal court. The United States District Court for the Northern District of Ohio (Supp. App. A120-A138) affirmed that the statute of limitations was not a bar. Pet. App. A7. However, reasoning that 42 U.S.C. 6928(b) required a public hearing, the district court set aside the fine and remanded the case

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[2] Vasi never answered this complaint, and so a default decision was entered against him. Supp. App. A175.

"to the ALJ to conduct an evidentiary hearing on respondents' potential liability for the $25,000 civil penalty assessed against them in the USEPA's Second Amended Complaint." Supp. App. A136.

6. On remand, an ALJ conducted a public hearing on October 3, 1994. In a letter to all counsel in September 1993, the ALJ established the hearing format, allowing EPA to present the direct testimony of its witnesses by submitting transcripts of their testimony at the 1984 hearing and requiring EPA to make these witnesses available for cross-examination. Supp. App. A45-A47. After EPA's first witness, the Ohio EPA inspector, testified to reaffirm her 1984 testimony, Shillman, Brueggemyer and the Partnership declined to cross-examine her. They also indicated that they would not cross-examine EPA's second witness who was going to reaffirm his 1984 testimony, so the ALJ concluded that it was not necessary for that witness to appear. *Id.* at A46. EPA attempted to call Shillman to testify, but he refused. The ALJ then allowed EPA to introduce into evidence the transcript of Shillman's testimony from the 1984 hearing. Shillman, Brueggemeyer, and the Partnership rested their case without presenting any evidence. *Ibid.*

The ALJ, reviewing the prior testimony submitted into evidence *de novo*, found (Supp. App. A93-A119) that the evidence was sufficient to find Shillman, Brueggemyer and the Partnership jointly and severally liable for all but one of the alleged violations and assessed a penalty of $23,500. Pet. App. A7. On appeal, the Environmental Appeals Board (the successor to the role of the Chief Judicial Officer) affirmed (Supp. App. A42-A92). The Board held that the federal district court's determination that EPA's complaint was not time-barred was the "law of the case" and held that the

prior testimony was "probative, relevant, and reliable" and thus properly admissible and not a violation of due process. Pet. App. A8.

7. Shillman, Brueggemeyer and the Partnership again sought judicial review. The district court (Pet. App. A20-A41) reaffirmed its earlier determination that the Second Amended Complaint was not barred by the statute of limitations, *id.* at A33-A36, and found that the 1994 hearing before the ALJ was conducted "in accordance with the Court's 1991 Opinion requiring that the petitioners be given the 'opportunity to present evidence' in defense of the penalty assessed against them," *id.* at A39.

8. On June 29, 2000, the court of appeals held that Shillman and the Corporation had failed to answer candidly the substance of the averments made in EPA's initial complaint against them, and should have disclosed in a more timely manner the difference between the Partnership and the Corporation. Pet. App. A9-A11. The court held that EPA's action against petitioners was not barred by the statute of limitations because EPA's April 15, 1985 motion "To Conform Pleadings to Proofs" was filed "within five years of the alleged violations" and, although not a formal amended complaint, EPA's April 15 motion was essentially a motion for leave to amend which "itself may be acceptable so long as it puts the opposing party on notice of the content of the amendment." *Id.* at A12-A13 (quoting *Moore* v. *Indiana*, 999 F.2d 1125, 1131 (7th Cir. 1993)). The court found that there was "little doubt" that the motion, as well as other developments in the proceedings, put Shillman and the Partnership on notice that EPA was intending "to proceed against them." *Id.* at A12. Because the April 15 motion did not mention Brueggemeyer, however, the court concluded

that "it does not appear that EPA did anything to add her as a party during the five-year limitations period" and thus reversed the finding of liability against her. *Id.* at A14.

The court also held that the 1994 hearing before the ALJ satisfied due process. Rejecting petitioners' contention that it was improper to allow the adopted 1984 hearing testimony into evidence, the court noted that Shillman participated in the 1984 hearing; that Shillman and the Corporation had every incentive to challenge that testimony because the Corporation "expressly assumed all of the partnership's liabilities;"[3] and that the same lawyer represented petitioners in the 1984 and 1994 hearings. Pet. App. A14-A15. The court also noted that in the 1994 hearing petitioners "were given the opportunity to cross-examine the EPA's witnesses, to present evidence that the violations did not occur, or to show that they should not be held responsible if they did occur [but] did none of these things." *Id.* at A15.

Judge Wellford dissented with regard to the statute of limitations issue. He concluded that EPA's Second Amended Complaint filed in November 1987 was the relevant filing for limitations purposes and that it was filed more than five years after the alleged violations. Pet. App. A17-A19.

## ARGUMENT

The court of appeals correctly ruled that the EPA's action was not time-barred and that submitting prior testimony into evidence in the 1994 administrative hearing did not violate principles of due process. Those

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[3] Indeed, the court of appeals was "at a loss to understand why the ALJ [in the 1985 decision] did not simply impose successor liability" on the Corporation. Pet. App. A11; see also *id.* at A15.

rulings do not conflict with any decision of this Court or another court of appeals and do not warrant further review.

1. Petitioners contend (Pet. 19-24) that the court of appeals' application of the doctrine of "relation back" conflicts with this Court's holding in *Schiavone* v. *Fortune*, 477 U.S. 21 (1986). *Schiavone* involved "relation back" under the Federal Rules of Civil Procedure (FRCP), which do not bind EPA administrative proceedings, see Pet. App. A6 (citing *Sloan* v. *SEC*, 547 F.2d 152, 155 (2d Cir. 1976), cert denied, 434 U.S. 821 (1977)). For that reason alone, this case does not conflict with decisions such as *Schiavone* that interpret the FRCP.

But petitioner's assertion of a conflict misses the mark for an even more fundamental reason. The court of appeals did not apply any type of "relation back" doctrine to EPA's administrative action. As it noted, "discussion of the 'relation back' doctrine is misplaced." Pet. App. A12. Rather, the court found that when EPA filed its motion "To Conform Pleadings to Proofs" on April 15, 1985, a date "within five years of the alleged violations," the agency "formally requested permission to proceed" against Shillman and the Partnership. *Ibid.* The court then concluded that such a motion satisfies the five-year limitations period governing EPA's administrative action. *Ibid.* The court of appeals was quite explicit that this was the basis for its holding. *Id.* at A12-A13. The court's decision to dismiss the case against Brueggemeyer, because she was not named in the April 1995 motion, eliminates any further doubt that could exist regarding the court's rationale. *Id.* at A14. Brueggemeyer was named in the Second Amended Complaint, *id.* at A5—the filing that petitioners believe the court found to "relate back" to the

original complaint—so the court would have treated her the same as Shillman and the Partnership if it had found that it was the Second Amended Complaint that satisfied the statute of limitations.

At the end of their statute of limitations discussion, petitioners acknowledge that the court of appeals actually decided that the April 1985 motion satisfied the limitations period. Pet. 23-24. Petitioners contend this decision was erroneous because EPA never filed an amended pleading with the motion. Pet. 24. They cite no case, however, holding that an amended pleading must accompany a motion to add parties in order to satisfy the statute of limitations in an administrative proceeding. In federal court practice, timely motions to add parties can satisfy the statute of limitations, even when the amended complaint is not filed within the limitations period. See, *e.g.*, *Mayes* v. *AT&T Info. Sys., Inc.*, 867 F.2d 1172, 1173 (8th Cir. 1989) (per curiam); *Rademaker* v. *E.D. Flynn Export Co.*, 17 F.2d 15, 17 (5th Cir. 1927); *United States* v. *City of Toledo*, 867 F. Supp. 603 (N.D. Ohio 1994); *Christiana Gen. Ins. Co.* v. *Great American Ins. Co.*, 745 F. Supp. 150 (S.D.N.Y. 1990); *Chaddock* v. *Johns-Manville Sales Corp.*, 577 F. Supp. 937 (S.D. Ohio 1984).

Petitioners also contend that the April 1985 motion was not a motion to amend the complaint and add parties, Pet. 24, but cites no evidence indicating that the court of appeals' conclusion to the contrary was clearly erroneous. In fact, the motion to amend was accompanied by a memorandum that described EPA's arguments for adding the Partnership and Shillman. See Memorandum in Support of Motion to Conform Pleadings to Proofs, *In re J.V. Peters & Co., Inc.*, Docket No. V-W-81-R-75 (Region V, EPA). The motion and accompanying memorandum were served on the

same attorney currently representing the petitioners, thereby providing clear notice to the petitioners, within the limitations period, of the substance of the proposed amendment. Moreover, in addition to the April 1985 written motion, EPA made an oral motion at the October 1984 hearing to amend its complaint. Hearing Transcript, *In re J.V. Peters & Co., Inc.*, Docket No. V-W-81-R-75 (Oct. 1984), at 43. This oral motion also was sufficient: "Leave to amend also may be requested in open court instead of by formal motion. Courts have held that an oral request to amend a pleading that is made before the court in the presence of opposing party's counsel may be sufficient if the adverse party is put on notice of the nature and purpose of the request and is given the same opportunity to present objections to the proposed amendment as he would have if a formal motion had been made." 6 Charles Alan Wright et al., *Federal Practice and Procedure* § 1485 (2d. ed. 1990).[4]

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[4] Even if the Federal Rules of Civil Procedure applied in EPA administrative actions, and even if the April 1985 motion did not satisfy the statute of limitations, the Second Amended Complaint filed in 1987 would relate back and satisfy the limitations period. Petitioners concede that the first two *Schiavone* requirements were met—that "the basic claim must have arisen out of the conduct set forth in the original pleading [and] the party to be brought in must have received such notice that it will not be prejudiced in maintaining its defense," 477 U.S. at 29. Pet. 20. Petitioners argue, however, that "relation back cannot occur here because none of the Petitioners knew, or should have known, that EPA would have sued them but for a mistake in identity." *Ibid.* The court of appeals found just the opposite. It concluded that petitioners engaged in an "intentional litigation tactic" to conceal from EPA the fact that the agency named the successor-in-interest Corporation in the original complaint, Pet. App. A9, and that after the 1985 motion, there was "little doubt that Shillman and J.V.

2. Contrary to petitioners' suggestion (Pet. 25-27), the ALJ's decision to admit testimony at the 1994 hearing from the earlier 1984 hearing did not violate petitioners' due process rights. Petitioners cite no case holding that a witness's adoption in an administrative hearing of prior testimony, when the adverse party had ample opportunity and incentive to impeach the prior testimony, gives rise to a due process violation. The district court in 1991 remanded this action because it found that 42 U.S.C. 6928(b) required a hearing at which Shillman, Brueggemeyer, and the Partnership "are given the opportunity to present evidence in their own defense." Supp. App. A136. A hearing was held at which the ALJ afforded Shillman, Brueggemeyer and the Partnership that opportunity, but they declined to exercise it. The district court did not require anything more. Nor does the Due Process Clause. As this Court has explained, the "fundamental requirement of due process is the opportunity to be heard 'at a meaningful time and in a meaningful manner.'" *Matthews* v. *Eldridge*, 424 U.S. 319, 333 (1976) (quoting *Armstrong* v. *Manzo*, 380 U.S. 545, 552 (1965)).

The 1984 testimony is not even testimony from a different case or an out-of-court written statement —both of which the Federal Rules of Evidence permit in certain circumstances and are not thought to violate due process, see, *e.g.*, *In re Adair*, 965 F.2d 777 (9th Cir. 1992). The 1984 testimony is evidence presented earlier in the *same* administrative action.[5] It is often the case

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Peters & Co. knew or should have known that the EPA" intended to proceed against them, *id.* at A12; see also *id.* at A35-A36, A151-A152.

[5] Although an ALJ dismissed the case in 1987, in September of that year the ALJ granted EPA's motion for relief from the

that judicial or administrative bodies, after an appeal and remand, continue to consider evidence submitted before the remand, when the appellate decision did not call into question the reliability of that evidence. Petitioner points to nothing that makes this practice constitutionally suspect.

Moreover, petitioners had ample procedural protections. As the court of appeals noted, petitioners had the opportunity and motivation to cross-examine the government's witnesses at both the 1984 and 1994 hearings. Pet. App. A15. And, well in advance of the hearing, the ALJ informed petitioners that EPA would be allowed to resubmit the 1984 testimony and provided petitioners with those portions of the testimony that EPA intended to rely on.

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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DECEMBER 2000

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dismissal and allowed EPA to submit a "Second Amended Complaint," thus continuing the administrative action that commenced in April 1981.